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In the Supreme Court of the United States

OCTOBER TERM 1954

No. [redacted] 16

MARVIN STUART WALTON,
Petitioner

v.

PEOPLE OF STATE OF CALIFORNIA,
Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Santa Clara

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OCTOBER TERM 1954

No. .....

MARVIN STUART WALTON,
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v.

PEOPLE OF STATE OF CALIFORNIA,
Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Santa Clara

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California, entered in the above entitled case on July 16, 1954.

OPINIONS BELOW

No opinions were rendered either by the Municipal Court, Palo Alto—Mt. View Judicial District, or the Appellate Department of Superior Court of the State of California in and for the County of Santa Clara.

JURISDICTION

The judgment of the Appellate Department of Superior Court was pronounced on July 1, 1954, and a petition for rehearing was denied on July 16, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

Article VI, Sec. 5 of the Constitution of the State of California provides: "The Superior Courts shall have appellate jurisdiction in such cases arising in municipal and justices and other inferior courts in their respective counties or cities and counties as may be prescribed by law. The Legislature may, in addition to any other appellate jurisdiction of the Superior Courts, also provide for the establishment of appellate departments of the superior court in any county or city and county wherein any municipal court is established, and for the constitution, regulation, jurisdiction, government and procedure of such appellate departments."

The Legislature provided for such appeals in criminal cases by the enactment of Sections 1466-1469 inclusive of the Penal Code of the State of California. Section 1468 thereof provides that the procedure of such appeals shall be prescribed in rules promulgated by the Judicial Council. The Judicial Council promulgated the Rules on Appeal from the Municipal Courts and Inferior Courts in Criminal Cases effective July 1, 1936 (Rules 1-11).

From the final judgment of the Superior Court after the taking of such an appeal, from the Municipal Court, petitioner has no further appellate remedy under the laws of the State of California. Rules 7 and 10 of the Revised Appellate Department Rules promulgated by Judicial Council effective September 15, 1945 provide that entry of final judgment occurs upon the denial of the petition for rehearing. The petition for rehearing was denied on July 16, 1954.

QUESTIONS PRESENTED

Whether the means employed by state police to cause the involuntary extraction of blood from petitioner to determine sobriety and the use of the results of such a blood test as evidence of intoxication in a state prosecution for driving a motor vehicle while under the influence of alcohol violates the Due Process Clause of the Fourteenth Amendment under the circumstances of the instant case.

(i) Where the petitioner protests and refuses his consent to taking such blood test,

(ii) where the blood sample is extracted by police personnel from the petitioner by means of coercion and force,

(iii) where the police officers deny petitioner his request to consult his attorney or doctor during the time that the officers are compelling petitioner to submit to the blood test, and

(iv) where the results of a blood test taken in such a manner are admitted in evidence against petitioner through an expert witness who testifies that he does not know who made the analysis indicating the alcoholic content of petitioner's blood.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

I. Procedural History of the Case

The petitioner was charged with violation of Section 502 of the Vehicle Code of the State of California, which provides that driving under the influence of intoxicating liquor is a criminal offense. A trial was had on November 18, 1953 without a jury despite the demand for jury by the peti-

tioner. On appeal before the Appellate Department of the Superior Court, the lower Court was ordered to grant petitioner his right to a trial by jury. On April 7, 1954, petitioner was tried and convicted before a jury on the same charge.

The sentence of the lower Court after trial without a jury and after the lower Court found petitioner guilty of violation of said Sect. 502 was as follows: $150.00 fine and 30 days in the county jail suspended with one year probation with no suspension of the driver's license. As a result of petitioner insisting upon his constitutional right to a jury trial under the state constitution, the sentence by the same judge for the same offense after verdict of guilty was as follows: $500.00 fine and 90 days in county jail, 5 days to be served with 85 days suspended, three years probation, and driver's license to be suspended for 90 days.

The Appellate Department of the Superior Court affirmed the judgment of conviction on July 1, 1954 and denied a petition for rehearing on July 16, 1954. Petitioner has no further remedy for appellate review in the state courts of California.

II. The Facts Material to the Questions Presented

The petitioner, after being stopped by the California Highway Patrol while driving his automobile on the public highway, south of Palo Alto, California, was taken to the Accident Investigation Bureau in San Jose (R. 53), where he was requested to submit to various tests for sobriety (R. 56). The officer, the technician, and the petitioner all testified that the petitioner refused to submit to these particular tests (Officer Shannon, R. 56; Technician, R. 69; petitioner, R. 111).

The petitioner was then asked to submit to a blood test wherein a sample of his blood was to be extracted from his

III. Federal Question Raised Below in Trial Court and Before Appellate Department of Superior Court

(A) In Trial Court:

When the petitioner made an objection to the introduction into evidence of the blood sample, the Court interrupted counsel before he could state his ground and overruled his objection (R. 67, 68).

Likewise, petitioner's motion to strike all evidence relating to the blood test was summarily denied with the admonition to petitioner's Counsel that "You have a half a minute, Mr. Di Maria; if you can't finish within that half minute, I am not going to compel the jury to wait any longer, we will adjourn for lunch" (R. 45).

Not being able to exclude the evidence by objection, trial counsel submitted instructions embodying the federal questions raised herein.

Petitioner submitted his proposed instructions VIII (R. 198), IX (R. 198), X (R. 199), and XI (R. 199), which embrace the federal question presented herein. These four proposed instructions were refused (R. 194).

Proposed instruction VIII provided as follows: "A person arrested because it appears that he is intoxicated, has the right to refuse to subject himself to any of the usual tests and to a blood test."

Proposed instruction IX provides as follows: "If any physical or other coercion frowned upon by due process is implied in taking a blood test without the consent and against the protests of a person arrested because it appears that he is intoxicated, the results of such blood test must be disregarded entirely."

Proposed instruction X provides as follows: "It is a denial of due process under the 14th Amendment of the Constitution of the United States and under the due process clause of the Constitution of the State of California, if

brutal or shocking force is exerted in obtaining a blood test without the consent and against the protests of the person arrested because it appears that he is intoxicated, and the results of such blood test must be disregarded entirely."

Proposed instruction XI provides as follows: "It is a denial of due process under the 14th Amendment of the Constitution of the United States if a blood test is exacted of a person arrested because it appears that he is intoxicated, by force and without the consent and against his protests, and the results of such blood test must be disregarded entirely."

No modified instructions embracing these issues were given to the jury (R. 180-188).

(B) Before the Appellate Department of the Superior Court:

Under the rules governing appeals in criminal cases from Municipal Courts to the Appellate Department of the Superior Court, the party prosecuting the appeal must file a "Statement of Appeal."

In the Statement of Appeal filed below in this case, petitioner specified as his first ground of appeal that the Municipal Court erred in refusing the proposed instructions VIII, IX, X, XI, set forth above. The Statement of Appeal herein is a part of the certified record of the Court below that is filed herewith.

The second ground specified as error the overruling of the objection made below by petitioner to the testimony of the Criminologist Bradford relating to the alcoholic content of the blood and to the denial of the motion to strike all evidence relating to the blood test.

These grounds specifying error were before the Appellate Department of the Superior Court which affirmed the Judgment of conviction and denied the petition for rehearing without filing any written opinion.

ARGUMENT

I. Certorari Should Be Granted In the Instant Case Because an Important Question Affecting Law Enforcement and the Rights of Accused Under the 14th Amendment Is Involved: The Doctrine of the Rochin Case Needs Amplification In Its Application to the Use of Involuntary Blood Tests

The blood test has become an important technique of law enforcement to the state police of the nation.[1] In 1953, seventy-nine thousand persons were arrested for drunk driving in the United States.[2] The blood test is frequently used in numerous jurisdictions by state police in the prosecution of drunk drivers.

The doctrine of the *Rochin* case has not been applied by this Court to the use of involuntary blood tests in state prosecutions. The state police, as well as the accused, are without the benefit of the guidance of this Court in the use of blood tests. How far the state police may go in extracting a sample of blood without violating the *Rochin* case doctrine is still an open question.

The Stanford Law Review, in commenting upon the *Rochin* case, focused atention on the issue: "What will the *Rochin* case mean as a guide to state law enforcement officers and courts? The language of the opinion will justify a simple answer as to stomach pumps: they fall below the minimum standards of due process. But what about other methods of modern criminology, such as involuntary blood tests? Will the use of evidence obtained by such tests be a violation of due process?"[3]

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1. Ladd & Gibson Legal-Medical Aspects of Blood Tests to Determine Intoxication, 29 Va. L. Rev. 749 (1943).

2. Uniform Crime Reports for the United States issued by the Federal Bureau of Investigation, Annual Bulletin for 1953.

3. 4 Stanf. L. Rev. 591 at 593 (1952).

II. Coercion Was Used to Compel the Petitioner to Surrender a Blood Sample In Violation of the Due Process Clause of the 14th Amendment

The coercive means employed by the state police to cause the involuntary extraction of blood from petitioner to determine sobriety violates the Due Process Clause and caused the evidence of the blood sample to be inadmissible.

Rochin v. California, 342 US 165, 72 S.Ct. 205 (1951).

All witnesses including the police and the petitioner agree that the petitioner refused to submit to the blood test upon being taken to the police station (R. 56, 57, 72, 110). Petitioner asked to consult an attorney or a doctor before submitting to the blood test but was refused (R. 59). While the petitioner continued to protest and refused to submit, one of the police officers rolled up his sleeve and held his arm while the police technician injected the needle and extracted the blood (R. 141, 142). The police officers told the petitioner he had no other choice except to submit to the blood test (R. 141).

Coercion was applied when petitioner was told he had to submit to the test "or else". The refusal to allow him to seek independent advice either legal or medical served the further purpose to indicate to the petitioner at the time he could not refuse to submit to the test and must remain at the police station until he was compelled to give his blood. Notwithstanding this coercion, the petitioner continued to protest as the officer applied the force needed to prepare his arm for the injection and the other officer applied the needle.

While the petitioner did not resort to violent physical resistance, and thus did not provoke further more violent restraint being imposed by the officers upon him, the force and coercion that were in fact used were no less repugnant

to the fundamental constitutional guarantees of the petitioner. The coercion found in this case shocks the conscience and offends our sense of fairness though accompanied by force more slight and subtle than found in the *Rochin* case. The enforcement of the constitutional rights of a defendant cannot be reserved for the bully defendant whose violent propensities cause more overt physical resistance to the compulsion of the officers.

The petitioner's own language best explains his state of mind when the officers seized his arm and commenced to take the blood sample: "The only way I could object to it physically was to shove them away, and that would have aggravated the situation" (R. 141).

The peaceful defendant such as the petitioner should not be penalized for his failure to strike and kick the officers, where he persistently protests and refuses to submit to the blood test and the officers seize his arm and inject the needle against his will. Otherwise, a premium would be placed upon violent resistance, and only the ruffian's constitutional rights would be safeguarded by the Courts. The coercive conduct of the police in obtaining the evidence does not become less offensive because the defendant's refusal to submit is less violent. Such police conduct as found in the instant case comes within the doctrine of the *Rochin* case as violative of the petitioner's constitutional rights.

The lower court should have excluded such evidence not only because of the offensive police conduct but because the evidence was unreliable in that the person who made the analysis did not testify and the criminologist Bradford could not identify who made the analysis of the purported blood sample.

III. The Petitioner's Privilege Against Self Incrimination Was Violated When His Blood Was Extracted Against His Will and Over His Protest

Blood taken from the veins of the petitioner was inadmissible when taken from him without his consent. The physical coercion and forcible extraction of evidence from the veins of the petitioner by the use of a needle without the consent of the petitioner compelled him to be a witness against himself in violation of the Fifth and Fourteenth Amendments of the United States Constitution and the admission of such evidence was a violation of the petitioner's constitutional rights.

Rochin v. California, supra (Concurring opinions of Justices Black and Douglas);

Snyder v. Massachusetts, 291 U.S. 97, 78 L.Ed. 674, 54 S.Ct. 330;

Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524.

Therefore petitioner respectfully requests that a writ of certiorari issue to the Appellate Department of the Superior Court of the State of California in and for the County of Santa Clara.

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA, APPELLATE DEPARTMENT

No. 11

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

MARVIN STUART WALTON, DEFENDANT

ORDER PETITION FOR REHEARING DENIED

Wm. F. James, Presiding Judge.

I concur.

LEONARD R. AVILLA.

Dated: July 16, 1954.

The foregoing instrument is a correct copy of the Original on file in this office: Attest: July 19, 1954—G. E. Tarleton, County Clerk.

Filed July 20, 1954

KATHRYN EDMONDSON, Clerk of Municipal Court
By B. A. SHORT, Deputy.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA, APPELLATE DEPARTMENT

No. 11

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

MARVIN STUART WALTON, DEFENDANT

ORDER JUDGMENT OF THE LOWER COURT AFFIRMED

Wm. F. James, Presiding Judge.

I concur,

LEONARD R. AVILLA,

JUDGE W. W. JACKA, not participating.

The foregoing instrument is a correct copy of the original on file in this office. Attest: July 19, 1954—G. E. Tarleton, County Clerk, By P. H. Steiling, Deputy.

Filed July 20, 1954

KATHRYN EDMONDSON, Clerk Municipal Court
By B. A. SHORT, Deputy.

(7980)

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 402 16

MARVIN STUART WALTON,
Petitioner,
vs.
PEOPLE OF STATE OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Department of the Superior Court in and for the County of Santa Clara. The argument will discuss the sufficiency of the objection both in the trial court and the Appellate Department of the Superior Court to the introduction of blood test evidence.

QUESTIONS PRESENTED.

The question here presented involves a conflict of evidence and even if the evidence concerning the alleged involuntary taking of a blood sample, is taken most favorably to the defendant, no federal question is presented.

A further question here presented is whether this objection has been raised in the California courts.

STATEMENT OF THE CASE.

Petitioner was arrested for speeding, driving without a license, and drunk driving, all misdemeanors, on May 8, 1953 (RT 2:25; 4:16). He was arrested in Santa Clara County by State Highway Patrolmen. The complaint charged only drunk driving (misdemeanor) (RT 3). Petitioner entered a plea of not guilty and was tried by a jury in the Municipal Court (RT 1).

The jury returned a verdict of guilty (RT 189). Petitioner prosecuted an appeal in the Appellate Department of the Superior Court in and for Santa

Clara County. The judgment below was affirmed without opinion.

STATEMENT OF THE FACTS.

While on a routine patrol, Officers Shannon and Daly of the California Highway Patrol observed petitioner speed out from the parking area of a restaurant, cross the southbound traffic lane, and cut in front of another vehicle traveling north. The time was approximately 10:00 o'clock p.m. on a Friday evening and the traffic was heavy. Appellant's vehicle then accelerated and ricocheted from a traffic island. Petitioner's speed was clocked at 60 to 65 miles per hour in a 35 mile an hour speed zone (RT 8, 9).

After being stopped, petitioner refused to give his name, was staggering in his walk, was repetitious in his conversation, and failed to exhibit a California driver's license (RT 16).

Petitioner was then taken to the Accident Investigation Bureau in San Jose. While en route, he stated he had been drinking (RT 16, 18). Officer Shannon testified that petitioner was under the influence of intoxicating liquor (RT 21).

While at the Accident Bureau, petitioner refused to perform the balance and coordination test which is normally given as a test for sobriety (RT 20). He was also requested to give a sample of blood. He refused to do so at first, but later consented. Peti-

tioner finally rolled up his sleeve, stuck his arm out and said "Well, take it." (RT 57).

The technician who withdrew the blood sample testified that petitioner consented to taking of the blood (RT 39). This technician also testified that in his opinion the petitioner was under the influence of liquor at the time. He noted there was an odor of alcohol on his breath, that his face was flushed, that his clothes were slightly mussed, that his eyes were bloodshot, pupils dilated, and his attitude very antagonistic (RT 68).

The chemist who analyzed this sample testified that it contained 24 one-hundredths of one per cent of alcohol, and that this amount of alcohol would result in intoxication (RT 29).

Petitioner's testimony concerning the blood test in question is as follows:

> "They rolled up my left arm, sleeve of my left arm, and injected the needle and removed the sample, although I continued to object." (RT 110).

ARGUMENT.

I. THE OBJECTION TO THE ALLEGED INVOLUNTARY BLOOD SAMPLE IS RAISED FOR THE FIRST TIME IN THE PETITION FOR CERTIORARI.

Before a question may be raised in this court, it must have been properly raised in the court below. During the trial petitioner did not object to the introduction of the blood sample evidence upon the ground that it was taken by coercion. Although petitioner

could have raised a due process objection on appeal even though no timely objection was made in the trial court, he did not raised this question on appeal. (See *People v. Millum,* 42 Advance California 536, 539 (a confession case).)

Petitioner contends that he objected to the introduction of the blood sample evidence upon the ground that the sample was obtained by force. He refers to pages 67, 68 and 45 of the Reporter's Transcript to establish this claim. A reading of these pages will convince you that the sole basis of petitioner's objection to the introduction of this evidence was that the testimony of the results of the chemist's analysis was hearsay.

This conclusion is supported by the fact that this question was not raised on appeal. In order to establish this fact petitioner has filed herewith a certified copy of petitioner's briefs in the appellate department of the Superior Court. In these briefs appellant contends that the testimony concerning the blood sample analysis was hearsay; that the court erred in refusing to give his instructions concerning the blood tests and that the prosecutor exceeded the proper scope of cross-examination. It thus appears that no federal question was raised in the trial court or on appeal.

The question of the involuntary nature of the taking of the blood sample is raised for the first time in the present petition.

II. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

A. The propriety of the proposed jury instructions is purely a question of State law.

Whether or not the proposed jury instructions concerning blood samples obtained by force correctly state the law in the abstract is of no consequence. Whether such instructions should be given to a jury is purely a question of State procedure. The allocation of questions of fact between judge and jury is not prohibited by the 14th amendment. *Stein v. New York,* 346 U. S. 156 at 179 (confession case); *Snyder v. Massachusetts,* 291 U. S. 97, at 105 (abolition of a jury not a violation of due process—dictum). Alleged involuntary confessions are treated variously. Some states treat the question as one for the judge, others as a question for the jury, and a third group permits the question to be passed on by both judge and jury.

B. The question presented is at most one of credibility.

The petitioner has overlooked the rule that only evidence which is uncontradicted by the State in its version of the attendant circumstances is considered on appeal in determining whether there has been a denial of due process. *Stein v. New York,* 346 U. S. 156, 181, 183-184; *Gallegos v. Nebraska,* 342 U. S. 55, 61-63; *Harris v. South Carolina,* 338 U. S. 68, 69; *Turner v. Pennsylvania,* 338 U. S. 62, 63.

There is a conflict between the witnesses for the prosecution and the testimony of the petitioner. This conflict, however, has been resolved by the trier of fact in favor of the prosecution.

The testimony of Officer Shannon was that petitioner was asked to submit to a blood test. He raised his sleeve then changed his mind on the subject. This occurred a couple of times. He finally raised his arm and said, "take it." (RT 58-59). Petitioner was not forced to submit to the blood test (RT 58).

The technician who withdrew the blood sample, testified that petitioner consented to the taking of the blood sample (RT 69).

The alleged forced withdrawal of a blood sample is, thus, without substance when any conflict between opposing witnesses is resolved in favor of the prosecution.

C. Even assuming the facts most favorably to the petitioner, no federal question is presented.

The case of *Rochin v. California,* 342 U. S. 165 is relied upon by petitioner. The taking of evidence from the person of defendant or by entry into his body was not the decisive factor in that case. The entire course of conduct was examined and found to be brutal and shocking.

In the *Rochin* case the police forced entry into a bedroom without a search warrant. When he placed some capsules in his mouth the police grabbed him by the throat and sought to force him to eject them. Thereafter they took him to a hospital where he was strapped to a table. A tube was put down his throat and the capsules expelled. It was stipulated that the capsules were taken from defendant by use of a stomach pump without his consent and against his will.

As we have noted above the testimony for the prosecution establishes that petitioner consented to the withdrawal and no force was used to secure this consent. However, even if it is assumed for the purposes of discussion that petitioner's testimony is correct, his testimony does not bring this case within the *Rochin* doctrine.

Petitioner testified that he objected to the taking of the blood samples and that "they rolled up my left arm, the sleeve of my left arm and injected the needle and removed the sample, although I continued to object." (RT 110).

This testimony falls far short of the test of shocking brutality as exemplified by the facts of the *Rochin* case as set out above.

CONCLUSION.

We respectfully submit that no substantial federal question is presented by the petition filed herein for a writ of certiorari and the same should be denied.

Dated, San Francisco, California,
November 12, 1954.

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